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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1714

ROBERT G. BRITTON, Commissioner, Alabama Department of Corrections, and JOSEPH OLIVER, Warden, Holman Prison,

Petitioners,

v.

JOHN LOUIS EVANS, III,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The respondent, John Louis Evans, III, by his undersigned counsel, asks leave to file the attached Memorandum Opposing Certiorari and to proceed in forma pauperis pursuant to Rule 53. Counsel has not yet received an affidavit from the petitioner, who is in the custody of the State of Alabama at the William C. Holman Unit of Alabama's state prison system at Atmore, Alabama. Mr. Evans affidavit in support of this motion will be forwarded to this Court immediately upon receipt.

Respectfully submitted,

JOHN L. CARROLL
DENNIS N. BALSKE
1001 S. Hull Street
Montgomery, AL 36104
205/264-0286

STEVEN A. REISS
2555 N Street N.W.
Washington, D. C. 20037

ATTORNEYS FOR RESPONDENT

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AFFIDAVIT

STATE OF ALABAMA)
)
COUNTY OF MONTGOMERY)

JOHN L. CARROLL, being duly sworn, states:

1. I am counsel to John Louis Evans, III in Britton v. Evans, now pending in this Court on petition for writ of certiorari, and I make this affidavit in support of Mr. Evans' motion for leave to proceed in forma pauperis. My representation of Mr. Evans is without renumeration.

2. Mr. Evans is presently in the custody of the State of Alabama and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Evans by me and will be forwarded to this Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Evans is attached hereto.

3. Respondent had counsel appointed to represent him at his trial and on his appeal.

4. I am informed and believe that because of his poverty, Mr. Evans is unable to pay the costs of this casue or to give security for same.

5. I believe that Mr. Evans is entitled to redress in this cause for the reason that his conviction and sentence of death

were obtained in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution of the United States.

JOHN L. CARROLL

SWORN to and subscribed before me, this 15th day of May, 1981.

Notary Public

My commission expires: 11/1/81.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

In its petition for a writ of certiorari, the state asked this Court to defer its decision on the petition until after the Alabama Supreme Court rendered its decision in Ritter v. State, a case remanded by this Court to the Alabama Supreme Court in light of this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980). See Ritter v. Alabama, ___ U.S. ___, 100 S.Ct. 3044 (1980). The state requested that this Court's disposition of its petition in this case be held in abeyance pending the outcome of Ritter because "[t]he federal constitutional issues and the underlying state law questions in the Ritter appeal are identical to those in the present case ...." Petition at 59. Because Ritter's case is identical to Evans', the state recognized that "if the Alabama Supreme Court holds that in view of the Beck decision [Ritter] is entitled to a new trial as a matter of state law, that holding will moot not only this petition but this entire federal habeas proceeding." Petition at 60.

The Alabama Supreme Court has just handed down its decision in Ritter, and has ruled that, as a matter of state law, Ritter

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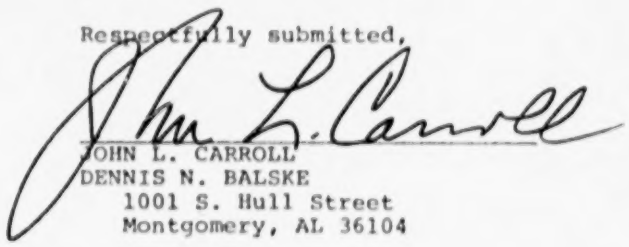
is entitled to a new trial. Ritter v. State, ___ So.2d ___ (May 9, 1981, No. 77-798). (A copy of the decision is attached as Appendix A). Thus, as the state concedes, Evans too is entitled to a new trial under state law. The Alabama Supreme Court's decision in Ritter confirms the correctness of the Fifth Circuit's decision in this case and, as the state concedes, renders the state's petition in this case moot.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENT

MAY 8 1981

THE STATE OF ALABAMA - - - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

Ex parte Wayne Eugene Ritter

·77-798 PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Wayne Eugene Ritter, Alias

v.

State of Alabama)

SHORES, JUSTICE.

Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State [MS. December 19,

1980], ___ So. 2d ___ (Ala. 1980).

REVERSED AND REMANDED.

Torbert, C. J., Faulkner, Almon, Embry, and Beatty, JJ., concur.

Maddox, Jones, and Adams, JJ., concur in part and dissent in part.

JONES, JUSTICE (Concurring in part and dissenting in part):

The majority of the Court, by directing that the Court of Criminal Appeals reverse the judgment of conviction and sentence and remand the case for a new trial, has mandated that all pre-Beck death penalty convictions and sentences be set aside and new trials ordered. As to the judgment of conviction in the instant case, I respectfully dissent.

This death penalty case was remanded by the United States Supreme Court for this Court's reconsideration in light of

Beck v. Alabama, ___ U. S. ___, 100 Sup. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Beck declared unconstitutional the application of the provision of the Alabama Death Penalty Act which precludes the trial court from instructing the jury on lesser included offenses, where, as was the case in Beck, the evidence is susceptible of a finding of such an offense. Here, as in Beck, the jury was instructed, pursuant to Alabama Code 1975, § 13-11-2(a), to return either a verdict of guilty with a sentence of death or a verdict of not guilty, precluding the option of finding the defendant guilty of a noncapital offense.

Unlike Beck, Ritter's evidence of record fails to support any finding other than a verdict adjudging the Defendant guilty of the capital offense as charged. Unquestionably, had the death penalty statute not included the "preclusion of lesser included offenses" clause (thus conforming the statute to Beck on remand ([MS. December 19, 1980] ___ So. 2d ___ (Ala. 1980)), Ritter would not have been entitled to a jury instruction on lesser included offenses.

As Ritter's counsel suggests, however, this does not end our inquiry; it merely establishes one of the premises upon which the ultimate dispositive issue must be answered. Another essential premise is the further objective fact that the death penalty statute, under which Ritter was tried, convicted, and sentenced to die, did include the "preclusion" clause, the operative effect of which may have unduly restricted Ritter's defense with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions.

Stated another way, whether the instant record would have entitled Ritter to a lesser included offenses instruction (thus

offering the jury a third optional finding) is not the issue; rather, the issue is whether Ritter was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser included offense under appropriate instructions.

The State summarizes its argument as follows:

> "There was absolutely no evidentiary basis at Ritter's trial for any lesser included offense instruction. There was no evidentiary dispute about any element of the capital offense, because Ritter confessed to and admitted every element of the capital offense, and he did so both before and during the trial. In addition, Ritter pleaded guilty and his valid guilty plea was accepted by the trial court and entered in the official judgment entry and minutes of the court. The trial court did submit the case to a jury since only a jury can sentence a capital defendant to death, but Ritter's voluntary guilty plea still conclusively establishes his guilt and removes any factual issue from the case."

Ritter's "fundamental fairness" argument is premised on the proposition that the "preclusion" clause operated to bar or to discourage alternative trial strategy, including the offering of evidence which would support a noncapital offense verdict. He argues:

> ". . . The very existence of the provision precluding jury consideration of lesser included offenses would almost invariably affect a capital defendant's strategy, the presentation of evidence and even, as in this case whether actively to contest the charges against him. It is clearly constitutionally impermissible for the state to tell a capital defendant that he may not present evidence of lesser included offenses at trial, and then seek to prevent the defendant from complaining of this unconstitutional prohibition on the grounds that he failed to present such evidence."

Although I disagree with the majority's reversal of Ritter's conviction, I reject the State's contention as an overly simplistic approach. Surely, the presence of the factual issue of lesser included offenses in Beck does not limit the application of its holding to only those cases in which the evidence of record supports such a finding. We do not read Beck as suggesting that a pre-Beck

capital defendant was required to so posture his trial strategy as to affirmatively invoke the application of the lesser included offense doctrine, or failing to do so, forfeit the protective cloak of Beck.

While the State, in my opinion, has interpreted Beck far too narrowly, I believe, as to the judgment of conviction, Ritter's counsel has given it an overly broad interpretation.[1] Although his argument is persuasive and, undoubtedly, one that ordinarily will prevail, I do not read Beck, nor the Supreme Court's remand of the instant case, as mandating reversal in every case in which the defendant has been convicted and sentenced to death under Alabama's death penalty statute.

I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the lesser included offenses doctrine. Because such hypotheses may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be resolved in favor of granting the defendant a new trial.

Therefore, on review of this case, and other pre-Beck capital convictions henceforth, I would apply the following objective standard: The conviction is affirmable if, and only if, a composite of the testimony, after indulging every reasonable doubt in favor of the defendant, affirmatively reveals a clear, unequivocal and undisputed chain of events comprising all of the elements of the capital

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1. As shown later in this opinion, I accept defense counsel's contention as to the judgment of sentence.

offense to the total exclusion of any reasonable fact or circumstance supportive of a lesser included offense. The inference of such an hypothesis necessarily arises unless the proof of record establishes defendant's guilt of the capital offense fully and undisputably, affirmatively precluding every reasonable inference to the contrary.

Applying this standard of review to the instant case, I am unable to perceive from the proof of record before us any possible hypothesis other than that of the Defendant's guilt of the capital offense as charged in the indictment.

Aided by the Court of Criminal Appeals' summary of the evidence in Evans and Ritter v. State, 361 So. 2d 654, 656-661 (Ala. 1977), and Ritter v. State, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (Ritter v. State, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand--against advice of counsel and following the trial court's thorough admonition as to his constitutional rights--and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by Beck visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

To hold otherwise would be tantamount to allowing the Defendant, by way of a new trial, to raise factual issues wholly contrary and in direct contradition to those established by his own sworn testimony in the original trial. His option to so testify in the original trial cannot be said to have been impermissibly encouraged by the constitutionally invalid "preclusion" clause.[2]

While I would affirm the judgment of conviction, I, nonetheless, would reverse the judgment of sentence and remand to the Court of Criminal Appeals with instructions to remand this cause to the circuit court for a new trial on the issue of sentence in accordance with this Court's opinion in Beck after remand.

My differentiation between the conviction and the sentence is based primarily on the lack of a bifurcation of the pre-Beck jury proceedings with respect to the finding of guilty and the fixing of the sentence. While it can be said that the United States Supreme Court's Beck mandate does not conclusively require a reversal of Ritter's conviction, I think its mandate is equally clear that the sentencing procedure, which is influenced by factors other than absence or presence of lesser included offenses criteria,

2. See Brady v. United States, 397 U. S. 742 (1970).

is impermissibly tainted, requiring a sentence hearing pursuant to the restructured proceedings established by Beck after remand.[3]

Maddox and Adams, JJ., concur

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 8 day of May 1981

J O Sentell

Clerk, Supreme Court of Alabama

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3. See Brady v. Maryland, 373 U. S. 84 (1963); Parker v. North Carolina, 397 U. S. 790 (1970).

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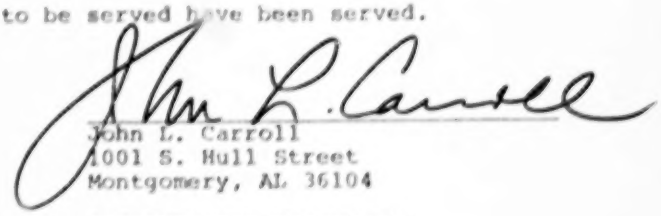
CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 1981, three copies of the Memorandum Opposing Certiorari and Motion to Proceed in forma pauperis were mailed, postage prepaid, to Hon. Ed Carnes, Assistant Attorney General, 250 Administrative Building, Montgomery, Alabama 36130, counsel for the petitioners. I further certify that all parties required to be served have been served.



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ATTORNEY FOR RESPONDENT